MALAYSIAN REPORTS

HAJI ABDUL GHANI BIN ISHAK & ANOR v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. & Hashim Yeop A. Sani J.) May 12 & 19, 1981]

[Kuala Lumpur — Federal Court Criminal Appeal No. 30 of 1979]

Criminal Law and Procedure — Charge of committing corrupt practice — Whether charge bad for duplicity — Accused using public position for his pecuniary advantage — Whether accused also used his position for actual profit — Meaning of business — Abetment of charge — Essence of offence of abetment — Malacca State Constitution, art. 7(10) — Emergency (Essential Powers) Ordinance, 1970, s. 2(1) & 2(2) — Criminal Procedure Code (F.M.S. Cap. 6), s. 163.

Interpretation of statute — Ejusdem generis rule — Definition in statute — Meaning of "business" — Object of Legislation.

In this case the first appellant was convicted on the following charge —

> "That you on 2nd October 1974 in the State Executive Council, Malacca, in the District of Melaka Tengah, in the State of Melaka, being a member of the Administration, to wit a member of the Executive Council, Melaka, committed corrupt practice in that you while being such a member used your office for your pecuniary advantage, namely participated in the deliberation for approving an application for State land in the Mukim of Kuala Linggi, Alor Gajah, Melaka prepared by one Mohd. Noor bin Baba and submitted in the name of Kipah binti Othman on 2nd March 1974 and in respect of such land in which you were engaged in business likely to effect your pecuniary interest therein, and that you have thereby committed an offence punishable under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970."

The evidence against the first appellant was largely circumstantial but there was also direct evidence. The second appellant was charged with abetment of the offence and the evidence against him was circumstantial. The learned trial judge convicted the appellants and they appealed. The main grounds of appeal of the first appellant was (a) that the charge was bad for duplicity as it combined three known offences by importing the provisions of Article 7(10) of the Malacca State Constitution; (b) that the learned judge came to the wrong conclusion that there was already a business existing in respect of the land when the Executive Council met to approve the grant and that the 1st accused was already engaged in the business.

Held: (1) in the amended charge there was only one offence of committing corrupt practice and the rest of the charge dealt with particularizations. The particularizations could not have embarrassed or prejudiced the first appellant and the technical irregularity did not cause a miscarriage of justice;

(2) the learned trial judge was justified in this case in holding that there was a business existing on the date the Executive Council decision was made;

(3) although the evidence against the first appellant was largely circumstantial, there was also direct evidence against the first appellant and the conviction of the first appellant must be upheld;

(4) the evidence against the second appellant on the other hand was purely circumstantial and on the evidence there was insufficient material to show that the second appellant abetted the commission of the principal offence. The appeal of the second appellant must therefore be allowed.

Cases referred to:-

(1) *Abinash Chandra* v. *Emperor* (1936) 37 Cr. L.J. 439.
(2) *Lim Yow Choon* v. *Public Prosecutor* [1972] 1 M.L.J. 205.
(3) *Public Prosecutor* v. *Datuk Haji Harun bin Hj. Idris* [1977] 1 M.L.J. 15 at p. 19.
(4) *Public Prosecutor* v. *Dato Tan Cheng Swee & Ors.* [1980] 1 M.L.J. 117.
(5) *Shelmer's* (1725) Gilb. Rep. 200; 25 E.R. 139.
(6) *Rands* v. *Oldroyd* [1958] 3 All E.R. 344.
(7) *Nutton* v. *Wilson* (1889) 22 Q.B.D. 744.
(8) *Harris* v. *Amery* L.R.-1 C.P. 148.
(9) *Smith* v. *Anderson* 15 Ch. D. 247, 258.
(10) *Rolls* v. *Miller* (1884) 27 Ch. D. 71, C.A.
(11) *Re Griffin, Ex parte Board of Trade* (1890) 60 L.J. Q.B. 235 C.A.
(12) *National Coal Board* v. *Gamble* [1958] 1 Q.B. 11, 18.
(13) *Brown* v. *Director of Public Prosecutions* [1956] 2 All E.R. 189.
(14) *Chang Chwen Kong* v. *Public Prosecutor* [1962] M.L.J. 307 C.A.
(15) *Caldow Props* v. *Low Ltd.* [1971] N.Z.L.R. 311, 320.
(16) *Yap Liow Swee* v. *Public Prosecutor* [1937] M.L.J. 225.
(17) *Reg.* v. *Clow* [1965] 1 Q.B. 598.
(18) *Vernon* v. *Paddon* [1973] 3 All E.R. 302.
(19) *R.* v. *George Thomas Johnson* [1945] 2 All E.R. 105.
(20) *Jack Dennis Mc Vitie* [1960] 44 Cr. A.R. 201.
(21) *Public Prosecutor* v. *Datuk Tan Cheng Swee & Ors.* [1979] 1 M.L.J. 166, 178.
(22) *Quazi* v. *Quazi* [1979] 3 All E.R. 897, 902.
(23) *Rael Brook Ltd.* v. *Minister of Housing and Local Government & Anor.* [1967] 1 All E.R. 262, 265-266.
(24) *Rolls* v. *Miller* [1881-85] All E.R. Rep. 915; (1884) 27 Ch. D. 71.
(25) *R.* v. *Wimbledon Justices, Ex Parte Derwent* [1953] 1 All E.R. 390; [1953] 1 Q.B. 380.
(26) *Crawford* v. *Spooner* (1846) 6 Moore P.C. 1, 8-9.
(27) *Magor and St. Mellons R.D.C.* v. *Newport Corpn.* [1952] A.C. 189.
(28) *The Gauntlet* (1872) L.R. 4 P.C. 184, 191.
(29) *Rands* v. *Oldroyd* [1959] 1 Q.B.D. 204, 212.

HIGH COURT.

Mohamed Faidz bin Mohamed Darus (Senior Federal Counsel) for the Public Prosecutor.

Edgar Joseph Jr. for the 1st accused.

Annuar Ismail and *Amin Ismail* for the 2nd accused.

Cur. Adv. Vult.

Wan Yahya J.: The 1st accused, former State Assemblyman and Executive Council member and, for a brief period, the acting Chief Minister of Melaka, was charged for corrupt practice under section 2(1) of the Emergency (Essential Powers) Ordinance, No. 22 of 1970 and, pursuant to a certificate issued by the Attorney-General under section 416A of the Criminal Procedure Code, was jointly tried with the 2nd accused, who was charged with abetting him.

In order to facilitate a speedier understanding of the prosecution case, which, for reasons such as court's convenience, prosecution's tactics, witnesses' convenience, not mentioning their late arrivals, could not be presented in a more convenient sequence, I shall first, without going into their merits, set down briefly the prosecution case in a more orderly sequence.

At the time relevant to the charge the 1st accused was a member of the State Legislative Assembly and also a member of the State Executive Council. The 2nd accused was an employee of an advertising agency in Singapore. He was then a Singapore citizen and resided with his wife and children in the Republic. He also owns a business known as General Enterprise in Melaka of which business he was the General Manager and his younger brother, Daud bin Baba, was the Manager. Sometime in 1974 2nd accused

approached one Victor Khoo Cheng Boon (PW23), the Assistant General Manager of Times Publishings, Singapore, with a view to seeking Singapore investors desirous of forming a joint venture company to operate a prawn hatchery. 2nd accused said that he could get a piece of Government land if the Singaporeans were willing to provide the bulk of the capital and the expertise. Victor Khoo in turn introduced 2nd accused to one Lim Thor Lung, a petrol dealer. According to this witness, the introduction took place sometime in the month of January 1974. He was introduced to 2nd accused in February and he made one more visit in June or July 1974 before finally deciding to establish a company in January 1975.

At about the same time several transactions took place in Melaka. In January 1974 1st accused called at the District Office, Alor Gajah. As a State Assemblyman for that area and a member of the State Executive Council, known to most of the Government officers there, he had no difficulty at all in requesting for the special map of the Kuala Linggi area for his inspection. He then pointed out a particular area and asked for its tracing. That tracing was made up and handed to him immediately. A fee of $5 was also paid by him for that tracing.

On February 23, 1974 2nd accused drafted a letter (P6), requested his niece Kipah binti Othman (PW27) to type and sign it in her name and the same was received by the then Chief Minister on the same day. And on that very same day the Chief Minister minuted it to the District Officer, Alor Gajah, directing that the application be processed at once. Exactly four days after this on February 27, 1974 one Syed Ali bin Syed Idrus Al-Habshi (PW7), who was then the Assistant District Officer, wrote to Kipah requesting her to call at his office to fill up the necessary forms. On March 2, 1974 Kipah and the 1st accused travelled together in the 1st accused's car from Masjid Tanah to the Land Office, Alor Gajah. In the office of the Assistant District Officer a Settlement Officer, Stanley Gui (PW5) filled up an application form (P6C) while the 1st accused filled up the questionnaire form (P6F) both in connection with the application for State land. Kipah signed both the forms. As from this moment onwards the machinery for processing the application went into top gear. Letters were sent out immediately to various departments for their comments.

At about this time too, General Enterprises, the company owned by the 2nd accused and his brother Daud, went through a sudden transformation. The number of partners of the firm was increased from 2 to 5 and notably amongst the 5 new partners was the name of Abdul Ghani bin Ishak, the 1st accused.

Sometime in July 1974 the 1st accused casually made enquiries from the Kathi of Alor Gajah as well as from the Kathi, Wilayah Persekutuan on the procedural aspects of taking a second wife and of solemnising the marriage outside the district in which the bride resides. At first both Kathis thought 1st accused was jesting because they knew he already had a wife but he subsequently convinced them by stating that he was going to do so because he was childless. At about this time too the 1st accused proposed to Kipah and later asked her father for her hand in marriage.

On or about September 25, 1974 1st accused called on the Kathi, Alor Gajah and obtained from him the letter of consent for the marriage (P23). The letter addressed to the Kathi Wilayah Persekutuan contained the particulars of Kipah binti Othman, the bride to be, as given by Y.B. Haji Abdul Ghani bin Ishak, and not by the Imam of the district.

In paragraph 2 of that form the name and NRIC number of the bridegroom to be was left blank. The blanks were subsequently found on production before the Kathi Wilayah Persekutuan to be filled with the name "Dorani bin Sahak" and the NRIC of the 1st accused (P23). Likewise an application form from the intended bride (P20) was found to contain the name 'Dorani bin Sahak' instead of the 1st accused's name Abdul Ghani bin Ishak. In addition, a column under Schedule C of that form for specific use of the Juru Nikah or Imam of the district in which the bride resides was filled up by the 1st accused himself with words to the effect that the family had consented to the application. It ended with the words 'May this good intention be blessed by Allah'. The 1st accused signed as an Executive Council member using his official rubber stamp. On seeing this entry the Kathi pointed out that he could not do this, but the 1st accused satisfied him by saying that as an Executive Council member and a J.P. he too was authorised to do so. He also indicated that he was a well-known person as shown in the rubber stamp.

Turning back to the subject of the application for the land, the processing went on steadily. According to the District Officer, Tuan Haji Zakaria, 1st accused went to visit his office during the District Action Committee meetings and, from his recollection, the 1st accused did enquire about that application. The papers pertaining to the application were then prepared by the District Officer and forwarded to the Director of Lands & Mines, Melaka for submission to the Executive Council.

The application for the 500 acres of State land was placed before the Executive Council on October 2, 1974. The meeting was chaired by the then Chief Minister Encik (now Dato' Setia) Abdul Ghani bin Ali. The 1st accused, who was also present, neither disclosed his interest in the matter nor left the meeting room when the Council deliberated on this application. The 1st accused spoke and took part in the deliberations on this paper and, according to some, he strongly supported the application. The then Director of Lands & Mines, Syed Abdul Bari (PW20), who was asked to give his opinion, expressed his view that the applicant was too young and was an unmarried girl and drew the Council's attention to the adverse recommendation of the Fisheries Department. At this meeting at least two of the Council members objected to the application and one questioned the wisdom of making such a grant to an unmarried girl of 19. The 1st accused, however, spoke in support of the application and urged the Council to give the applicant, who is a Bumiputra, a chance. The Chief Minister then expressed the view that the applicant might be forming a joint venture company and after suggesting that the area be reduced from 500 acres to 200 acres, he ended on the rhetoric note 'kita

terima?' There appeared to be no further vocal opposition to his question, as indeed we were told such sustaining opposition rarely happened. When the Chief Minister uses such an expression, the application was passed by what these gentlemen termed to be their collective decision. According to this Honourable Member determination of their consensus by voting had never been their past practice. Anyway the decision was duly confirmed at the following Executive Council meeting held on October 31, 1974 at which the 1st accused was also present.

On November 18, 1974 the clerks at the Land Office received payment for the exact amount requested for in respect of premium, quit rent, registration fee etc. in the form of his personal cheque issued by Encik Ghani Ishak but they could not remember whether he or some other person effected the actual payment. Anyway the unusual feature about the payment is that it was made about two weeks prior to the letter P6E dated November 30, 1974 advising Kipah to collect and pay the actual amount.

A day prior to the wedding date the accused informed Encik Othman (PW14), Kipah's father, about his arrangement for the marriage to be solemnised in Wilayah Persekutuan. On October 2, 1974 he was driven separately from his daughter to Kuala Lumpur by 1st accused's brother and subsequently the marriage was solemnised at the Kathi's Office in Jalan Ampang.

Sometime in December 1974 the 1st accused contacted Mr. George Taye (PW28) and incidentally the father of a solicitor Mr. A.L. Taye of Messrs. Mah, Kok & Taye and instructed him to prepare the Memorandum and Articles of Association of Syarikat Samasetia Sdn. Bhd. The company's memorandum stated *inter alia* and indeed its first object was that of a hatchery.

The 1st accused's name featured prominently as its first subscriber. The 2nd accused's name was omitted but he appeared as a paid secretary of the company and his brother Daud bin Baba's name appeared as a Director. Kipah's name, which was originally included in the form, appeared to have been cancelled when the memorandum was presented to the Registrar of Business on February 4, 1975.

As invariably happened, not all of these facts were acceptable to the defence. A fair proportion of these was seriously disputed by the defence. It would be more appropriate to deal with them as I go along discussing the ingredients of the charges and in particular the submission of the learned counsel for the defence.

Now, what are the ingredients of the charge of corrupt practice under section 2(2) of the Ordinance? The prosecution will have to prove the following:

(1) That the accused was a member of the administration; and

(2) That in such capacity

(i) he used his position for his pecuniary or other advantage; or

(ii) he took part in the Executive Council on a matter relating to his trade, business or profession; or

(iii) he took part in any decision likely to affect his pecuniary interest therein.

Re ingredient (1):

Unchallenged oral proof and documentary proof in the form of *Gazette* Notification (Exhibit P15) have been introduced by the prosecution. Under section 57 of the Evidence Act the court must take judicial notice of their contents.

I consider this fact conclusively proved — indeed defence do not dispute this matter at all.

Re ingredient No. 2(i): (that the accused used his position for his pecuniary or other advantage.)

It was submitted by Mr. Edgar Joseph Jr., counsel for the 1st accused, that his client had not been proved to have had any interest in the application; that the only direct evidence on this had come from Kipah and that she had stated in evidence that she was making the application at the behest of her uncle, the 2nd accused. Counsel further submitted that as she was a witness called by the prosecution, this court should not reject her evidence. He stressed that the prosecution could not blow hot and cold at the same time and that the whole of her evidence had to be accepted *in toto*. Counsel referred to the Indian case of *Abinash Chandra* v. *Emperor*[1] and, in particular, to page 442, which reads as follows:

"The Crown has suggested, though not in so many words, that we ought to look with suspicion upon the evidence of these witnesses because they belonged to a faction in the company which was not favourably disposed towards N.C. Chouduri. A more unusual and a more impossible suggestion, I have never heard advanced. There are witnesses produced by the Crown, and put forward as witnesses of truth in support of the case for the prosecution. It has not been suggested that they turned hostile, nor during the whole trial were they treated as hostile witnesses, nor has anyone openly suggested that they were not truthful witnesses. The prosecution cannot be permitted to blow hot and cold as best to suit them. If these were not truthful witnesses, they ought never to have been called by the prosecution and so recommended to the court as witnesses of truth."

This apparently stringent decision is not without qualification. One only has to read part of the following sentence which reads: "There is no reason whatever for preferring the evidence of N.C. Choudhuri to theirs. . . ." — to understand that in the above-quoted passage the learned judge was referring to the rule against rejection of prosecution witnesses' evidence when there is nothing to suggest contra preference against his evidence. Our present case is somewhat different. The witness Kipah is the wife of the 1st accused and she had to be called by the prosecution to fill up the chain of events in that case. Answers elicited from her cross-examination by the defence has to be scrutinised with some care. As a wife testifying in a serious case against her husband, she could not be expected to be entirely immune from being unbiased, or in any event, uninterested. Moreover, when there are other evidences to the contrary, this court is not bound to accept each and every word in her evidence. If what was suggested is to be followed in the unqualified form, the function of a trial judge or jury will become obsolete and such function could be better decided by computer. There is nothing to deter the trial judge or jury picking or choosing any piece of evidence from a witness while

rejecting others which he or they felt not credible enough. After all a witness is capable of saying both truths and untruths. If, for any good reason, the court feels that part of his evidence should be preferred to the other, then it is at liberty to accept that part and reject the others. Indeed this has to be so when dealing with human as opposed to mechanical factors. That is partly why we are here to adjudge a case. This rule is not entirely without precedents. In *Lim Yow Choon* v. *Public Prosecutor,*[2] Azmi L.P. at page 206 said:

"In reference to the second question, we are of the view that notwithstanding that the cautioned statement was part of the evidence for the prosecution, and that there are facts in the cautioned statement which appear to contradict other parts of the evidence led by the prosecution, it was still open to the trial court as a judge of facts to assess the evidence and in so doing accept part of it and reject the rest."

Secondly in the renowned case of *Public Prosecutor* v. *Datuk Haji Harun bin Hj. Idris*[3] at page 19 Raja Azlan Shah F.J. observed:

"There is no rule of law that the testimony of a witness must either be believed entirely or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances."

In the present case a certain degree of bias and interest were also discernable from her demeanour when giving evidence and there is direct as well as circumstantial evidence in conflict with her story. I shall be dealing with these later on in my judgment.

Accordingly I would reject her mere denial of 1st accused's interest in this application as untrue.

Proof of 1st accused's pecuniary interest was introduced in the following circumstantial evidence:

Selecting suitable area and obtaining tracing:

Firstly, as early as January 1974, 1st accused had called at the Land Office, Alor Gajah and requested to view the office plan of the Kuala Linggi area. Stanley Gui's (PW5) evidence shows quite clearly that it was the 1st accused himself who selected or pointed out the particular area from the master plan and asked for a tracing of it to be made. The tracing was made immediately on the spot and was handed over to him. It was argued by learned defence counsel that no inference of 1st accused's interest could be drawn from this as such copies were readily available to all and sundry and in a Wakil Rakyat there was absolutely nothing wrong for him to obtain them for his friend as the act would be in line with the policy of assisting the public and of enhancing his popularity. I am unable to accept this argument. Assisting the public and in particular members of his constituency is no doubt the accepted practice of a political appointee but the exercise of a right to choose land for another's personal business project, i.e., prawn hatchery and to pay for that plan is stretching that policy beyond its endurable limits. What more if that person happened to be a Singapore citizen and therefore not a member of his constituency and the same person is the uncle of the girl he subsequently married.

Filling up forms:

Secondly, it is on evidence that on March 2, 1974 he accompanied this girl to the Land Office and then, in the presence of the Assistant District Officer Tuan Syed Ali bin Syed Idrus Al'Habshi and Stanley Gui, he filled up the questionnaire form intended for obtaining particulars from applicants. Here again, it was argued that this will not necessarily point to interest. I agree that taken on its own by itself this evidence may not be so, but when considered with other evidence and having regard to the fact that she is an educated girl doing a secretarial course, one begins to wonder where is the need to do so. There is no evidence to suggest that she was unaware of the particulars sought for in the form and, if she was unaware of them, then how could the accused be unless, of course, he had previous knowledge or interest in the application. It is pertinent to note here that of the two forms required to be filled by Kipah one was filled by the 1st accused and she was only left with the final act of signing. I have no hesitation in holding here that this evidence will add up to the inference of interest by 1st accused.

Premature payment:

Thirdly, it is also on evidence that after the approval of Kipah's application for the land, a letter dated November 30, 1974 was written by the Collector of Land Revenue to her conveying this decision and requesting her to call at the District Office to pay the premium and other related charges. Given the most expeditious delivery possible, one would have expected her to appear at the Land Office a couple of hours after it was written. Instead the evidence shows that the 1st accused and his bride to be arrived not less than 7 clear days earlier to pay the amount. Defence counsel for both accused suggested that there was a letter similar to the one stated received by Kipah. They referred to a minute in the Land Office, Alor Gajah's file (Exhibit P6) dated November 18, 1974 in which the writer referred to an enclosure which appeared to be like the alphabet 'u' or the figure '11' and they argued that there was in fact such a letter as claimed by Kipah. A more detailed inspection shows that there was no enclosure actually marked (11) in the file but there is an enclosure between (10) and (11) which was unmarked and which, if numbered in the normal sequence of events, would have been enclosure (11). This letter, however, is a letter from the Director of Fisheries on the same subject. I find this argument by the defence counsel to be rather illogical. Assuming that there had been an enclosure (11) which it was contended was missing from file P6 and on the strength of this letter the Land Office had authorised receipt of payment, then there was no purpose for another letter to be sent requesting for the same payment. There is yet another twist to this claim. All communications on this subject were kept in a file (D14) entitled 'Sama Setia' kept in the office of General Enterprise, a firm in which the 2nd accused was all the time the General Manager and the 1st accused by February 18, 1974 one of its partners. But no such letter was found in the enclosures.

A serious inconsistency also appears in Kipah's evidence with regard to this payment. She had stated that the missing letter, which she had received earlier, had advised that payment be made on November 18,

1974; that only when 2nd accused, her uncle, received the letter dated November 30, 1974 and told her about the approval of her application, she informed him about the earlier letter of approval. In other words, he only came to know about the approval on or after the subsequent letter was written, i.e. November 30, 1974. However, in her evidence earlier, she had said that her uncle gave her the actual amount plus $10 taxi fare sometime in mid-November. I cannot imagine how and why he should have given the correct amount down to the exact dollar to her sometime in the middle of the month when the information apparently came to her knowledge at the end of the month.

I am convinced that Kipah, out of the desire to protect the interests of her husband and her uncle, was lying in this particular matter. Accordingly, I would reject her evidence on the existence of this missing earlier letter of advice. I find as a fact that Kipah and the 1st accused have gone to pay the premium on the land before she was officially advised to do so and from this draw the inference that they did so on previous knowledge which the 1st accused, who had a few days before attended both the Executive Council meetings when the application was approved and when it was confirmed, had.

Personal cheque for premium:

Fourthly, it was undisputed that 1st accused used his personal cheque to pay for the premium. According to Kipah, she had handed over cash totalling $3,631 to the 1st accused to be paid to the Collector of Land Revenue and he had given her a lift to the Land Office. However, nobody at the Land Office recalled seeing her but of one thing they were certain i.e., the payment was effected by a personal cheque made out by the 1st accused from his own account.

Discussions with Singaporeans:

Fifthly, as mentioned in the prosecution case earlier, the 1st accused had met and discussed the formation of a prawn hatchery with one Victor Khoo Cheng Boon (PW23), Lim Thor Lung (PW24) and Chua Pa (DW4). Both PW23 and PW24 gave unchallenged evidence that the 1st accused showed interest in the project and they discussed about the formation of the company and that they had the impression then that the land was not obtained yet but was about to be given. But Khoo (PW23) could only remember that the meeting had taken place sometime in 1974. He could not, and apparently would not, say which part of the year this meeting took place. He agreed with the prosecution that it could be in June or July, then he agreed with the defence that it could be in November or December and finally he told the Deputy Public Prosecutor that it could be earlier.

The next witness, Lim Thor Lung (PW24) first thought that he was introduced to the 2nd accused in June or July 1974 and that he came to Malacca to inspect the land 2 or 3 times and that he came to know 1st accused possibly in January 1975 and decided to form the company in February 1975. On the subsequent day of hearing, however, the witness corrected himself. He then said that he first came to know the land was approved in November 1974 when he sent money by T.T. to either 1st accused or 2nd accused. He then remembered that he met 2nd accused in January 1975 and 1st accused in February 1974 when they discussed the prawn hatchery and 1st accused showed interest. He remembers coming 3 or 4 times and that only on his 4th visit sometime in 1975 did they decide to start the business.

This witness' evidence was vehemently attacked by the defence, who suggested that he was lying and that it could be unsafe to accept his evidence. In response to this objection I have carefully considered and scrutinised his testimony at the end of which I concluded that he was worthy of credit. Firstly I accept the explanation that he had realised his mistake after going home to Singapore during the adjournment of the case. The following passage from his evidence when questioned by the Deputy Public Prosecutor appears to me to be quite relevant.

"I said earlier that I met him in 1975, but when I went home on Tuesday after court I remembered I came to Malacca three or four times in 1974 — in January, February or July and in 1975 I came many times."

Despite the relentless and sharp cross-examination from counsel for 1st accused and an equally fierce examination from the other counsel, the witness repeated correctly his subsequent version. The witness further explained during re-examination that when he stood in the witness box on the first day it was his first time in court. He had waited for a long time in court to give evidence and he was feeling rather hot. He said that he had taken a good rest during the adjournment during which time he had time to recollect the past events. What this witness said in this respect was quite correct. He had appeared to me rather confused on the day when he first gave evidence but I had indeed advised him to get a proper rest so that he could be in a better frame of mind. There is also another factor that might have a bearing on this differing version and that was the service of different interpreters on each day.

In this regard I also found corroboration in the evidence of PW28, George Ivan Taye, who said that the 1st accused had contacted him with instructions to prepare the Memorandum and Articles of Association of Syarikat Samasetia. If the first meeting, as suggested by the defence, was in January 1975 and not earlier, the 1st accused would not have been in a position to do this let alone supply the name of subscribers.

I also find corroboration to this witness's assertion that he had met the 1st accused earlier from the testimony of PW23, who said that when the meeting took place he had the impression that the land was not given yet but going to be given. This piece of unchallenged evidence can only lead me to one conclusion and that is that the meeting was held before the land was approved, i.e. before October 2, 1974. As I said before, I have kept a close observation of this witness and observed his demeanour. He impresses me as a witness of truth, unbiased and indeed unconcerned with the insinuations hurled at him during the cross-examination. I have no hesitation in accepting his evidence as the true account of what had

transpired between him and both the accused persons.

Secret marriage to applicant:

Sixthly, three days after the approval of the application, the 1st accused secretly married the applicant. The marriage itself would have been uneventful had it not been for the fact that the girl he married had just acquired 200 acres of land, that she was ill qualified to manage the land and that long before the approval he had the intention of marrying her. At each and every important event necessitating her presence before the Land Office officials he had always been present to assist, counsel and apparently act for her. Not only was the marriage kept secret but it was rushed. Solemnising of the marriage was done during the day time in the office of the Kathi in Kuala Lumpur during the holy month of Ramadan, when by practice few Muslims would care to marry. So urgent and imperative was the marriage that the 1st accused had to employ the assistance of two Kathies with whom he had a long history of friendship and when the Alor Gajah Kathi hinted at the formality of getting an authentication on his marriage form he risked the charge of forgery by authenticating it himself and insisting that by virtue of the office he then held and his appointment as a J.P., he was empowered to do so. Viewed with the other evidence the 1st accused's act in keeping the marriage secret was a clear motivation at concealing his pecuniary interest and indicates a compelling desire to place an immediate protection over his interest. A husband would, to my mind, have a pecuniary interest in his wife's pecuniary assets, especially so if they are of the Islamic faith. After all husbands and wives not only share the same bed but their interests range far and wide over numerous matters including property. Under Muslim law a husband inherits the property of his wife. He is entitled to a Quranic share whether the wife dies testate or intestate and whether she is survived by children or not. Thus this is but an example of a husband's pecuniary interests in his wife's assets.

Subsequent acquisition and interest:

Seventhly, 1st accused's subsequent acquisition of shares, appointment as the Managing Director and his acquisition of shares in the Syarikat Samasetia must not be viewed in complete isolation in this case. No doubt, they are transactions or events taking place after the alleged offence but they form nevertheless subsequent conduct relevant towards showing the pecuniary, proprietory or financial value of his interest. No doubt, evidence has been introduced to indicate that he paid for the shares but the shares of a private limited company whose business appears to be viable and in respect of which the Singaporean was dishing out all the dole and expertise and shouldering the major burden of risk and in respect of which one need not pay up immediately, must be a highly attractive and financially sound purchase at par value. The authorised capital of the company is $500,000 and the 1st accused's allotted share was 10% of that and his wife Kipah an equal proportion. It is equally obvious that from the position he occupied as a Managing Director, the 1st accused commanded considerable authority, which is convertible into monetary value. The minutes of various meetings of the company show too well how he had secured financial benefit to his friend, the 2nd accused and even managed to get the Board of Directors to agree to the payment of an allowance to his wife for her to pursue her studies in Kuala Lumpur.

From the above evidence I am overwhelmingly convinced beyond any shadow of doubt that the 1st accused had pecuniary interest and advantage in the application, which was submitted by his then bride to be, Kipah.

Except for a passing comment on Ajaib Singh J.'s judgment in *Public Prosecutor* v. *Dato Tan Cheng Swee & Ors.*[4] the word 'pecuniary' has not been defined in a similar case. Without attempting to lay down an exhaustive defination of the word, I would consider its applicability in our present charge. 'Pecuniary' is derived from the Latin word 'pecus' meaning cattle or in our more civilised society it includes 'money'. In *Shelmer's*[5] case it is described, as an interpretation of a legacy, to have a larger and more comprehensive meaning than 'money'. I do not think merely because the term is contained in a penal law the meaning should be restricted and not be given its wide usage. In *Rands* v. *Oldroyd*[6] Lord Parket C.J., while considering the proper interpretation of the term 'pecuniary interest' said at page 347:

"... that the court would not be acute to cut down words otherwise wide merely because this was a penal statute."

In the same page his Lordship quoted with approval Lord Lindley's passage from *Nutton* v. *Wilson*[7] the guideline for a proper interpretation as follows:

"To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise."

In my view any interest relating to money or money's worth, any interest that could be converted into money, or any interest the object of which is to make money falls in the category of pecuniary interest.

Having satisfied myself with the pecuniary aspect of 1st accused's interest, I shall have to consider next whether the 1st accused had used his position for his pecuniary advantage. I find evidence on this in the following conduct of the 1st accused.

(i) In January 1974 he went to the Land Office, Alor Gajah. He was well-known to the officers there as an Assemblyman and an Executive Council member and there was no mistaking that he was treated as such when he made the request to view the plan. There was no evidence that he had asked for it for a purpose unrelated to his official capacity, resulting in the immediate preparation and issue to him of the tracing on the very day he called;

(ii) He had always been in the company of Kipah on both occasions when she was requested to be present and had shown some interest in the application by filling up the form for her and getting others like Stanley Gui to assist in filling in the particulars. He had also done all this in the office and presence of the Assistant District Officer, a privilege not usually accorded to ordinary applicants for land;

(iii) By issuing his own cheque for the payment of the premium he had accorded some interest in the matter;

(iv) Evidence also discloses that he had visited the District Officer (PW6) at the time when the application was being processed and enquired about the progress;

(v) During the discussion about the hatchery project and the formation of the company he had allowed himself to be introduced by 2nd accused as a Wakil Rakyat and Executive Council member.

Although the last five enumerated acts were the previous conduct of the 1st accused, they were none the less relevant for the purpose of proving the intention and consistency of his conduct during the Executive Council meeting on October 2, 1974. The account of what took place within the confines of the Executive Council room was related by not less than 5 witnesses, four of whom were Executive Councillors and the fifth, a Director of Lands & Mines, Syed Abdul Bari (PW20) recalled that he was merely there in attendance as the Director of Lands & Mines and that the 1st accused was also present. Being a good and loyal officer of the Government, he could not remember what was said and who said them, but confined his memory strictly within his official duties. However, he remembered quite well that he expressed opinion of doubt about this project and, if I may quote his own words, — "because of the applicant's age at that time. She was only 19 and unmarried." He recalled also that he had pointed out about the adverse report on the application by the Fisheries Department.

Datuk Yeow Kay (PW21) was more out-spoken. He could remember well how he had opposed the application. He had considered that a prawn hatchery contained in an area of 500 acres would require a very large capital. Then someone at the meeting including the Ketua Menteri gave him the impression that the applicant was going to form a joint venture company to assist the Malays. He could remember the 1st accused speaking in support of the application saying that in order to help Bumiputra economy, it should be supported. He recalled that at the suggestion of the Chief Minister, the area applied for was reduced from 500 to 200 acres and approved.

Another member of that Executive Council, Dato Mohd. Di (PW22) remembered objecting to the application. He had expressed doubts about the possibility of a girl of 19 starting a business successfully. He had unsuccessfully sought for the matter to be postponed to another date and further investigated. He recalled that the 1st accused had strongly supported the application for the land. In strongly supporting the application he recalled that the 1st accused had stated in effect his reasons were "to give a chance to Bumiputras to start a business according to the new economic policy and to give more work opportunities."

Also present at the meeting was Datuk Tan Cheng Swee, who testified that the method of determining majority opinion by votes was never known to the Executive Council of his time. Instead, the Chief Minister, like a past master of rhetoric, would pose the question "Kita terima atau tidak terima" and normally when it was followed by "Well, kita terima", the matter would be accepted by all. In respect of his own and 1st accused's conduct the witness had a rather reluctant memory. They could however be remarkably refreshed by confrontation with documentary exhibits — with the end result of his remembering that he was present and so was the 1st accused and that the latter did not declare his interest or leave the meeting room when Kipah's application was deliberated.

Yet another member of the Executive Council who 'questioned' the application is Haji Abdul Aziz bin Haji Alias (PW19). Being then a new Councillor, he felt he had a lot to learn by questioning. He was particularly baffled how "a 19 year old girl could do such a big business" and "get a big sum of money". So he posed both questions on these matters. He recalled some members opposed whilst others strongly supported the application. He could not relate what was actually said but he felt that the 1st accused supported the application and so did the Chief Minister.

It has been pointed out to me by the defence counsel that the witnesses could not be relied on as they had only vague memories of what happened so long ago; that there wasn't any strong support by the 1st accused; that whatever decision made by the Executive Council was a collective decision and so not that of the 1st accused alone.

Having seen the witnesses and heard them I am satisfied beyond doubt that although the witnesses could not remember in detail what was actually spoken — indeed who could — they had no difficulty in remembering that the accused spoke in favour of the application. At least two of them recalled that he spoke strongly in support. These witnesses were fellow Executive Council members of the 1st accused and there was nothing to suggest any bad relationship or other reason why they should be disbelieved. I accept the evidence on this and I find as a fact that the 1st accused was present; that he failed to declare his interest in the application and that he spoke strongly in support of it.

On the aforementioned facts discussed and found by me to be the true version, I have drawn the inference that the 1st accused had a pecuniary interest in the application submitted by Kipah and that he had used his official position as an Executive Council member for his advantage. I am mindful of the fact that the inference was drawn from circumstantial evidence but most of the evidence produced here, be they circumstantial in nature, are so cogent and clear that when taken together they lead me to the irresistible conclusion of his previous interest in this application.

Re ingredient 2(ii) & (iii)

(That the 1st accused took part in the Executive Council meeting relating to his trade business or profession or in any decision likely to affect his pecuniary interest therein.)

I have already discussed and found that the 1st accused had a pecuniary interest in the application. I have also held that he did take part in the Executive

Council meeting held on October 2, 1974 to deliberate and make a decision on the application. What remains to be considered is whether the 1st accused was engaged in trade, business or profession in respect of the application. Counsel for the accused contended that there was no such trade, business or profession in which the 1st accused was engaged at that time. Beyond stating that a penal statute should be construed strictly, the learned counsel offered no assistance towards the definition of the expression used in the Ordinance.

I have held earlier that I accepted Lim Thor Lung's (PW24) evidence that the meeting between the Singaporeans, the 1st accused and the 2nd accused actually took place sometime in February 1974. I also accept Victor Khoo's (PW23) evidence that 2nd accused had discussed the hatchery project and they had discussed about the formation of the company and about 1st accused wanting 10% of the shares and other allocation of shares and that the piece of land, which was then a State land, would be given to a 'person' as a concession to Bumiputra. I have no hesitation also in accepting the evidence of Lim Thor Lung (PW24) as well as that of Victor Khoo (PW23) that they were shown that piece of land and that he (Lim) had the occasion to visit it a couple of times before it was given. It is very logical that a prudent businessman like Lim, who was about to fork out about $300,000 or so, would be very interested in examining the land to determine its suitability for the hatchery project. Similarly, I do not consider it logical that these shrewd big time businessmen would talk terms about an expensive joint venture unless they have been assured of availability and suitability of the land and, most important of all, received a tentative offer to do business. In other words, there was already in existence a business proposition ready for implementation once the land was approved.

I am therefore satisfied that when the application by Kipah for the 500 acres came up before the Executive Council for deliberation on October 2, 1974, the 1st accused was already engaged in a business in respect of that land.

I have not been able to find the word 'business' being defined in any judgment relating to an offence of corrupt practice. In *Harris* v. *Amery*[8] it was said to have a more extensive meaning than trade. In *Smith* v. *Anderson*[9] Jessel M.R. said "anything which occupied the time and attention and labour of man, for the purpose of profit, is business". According to *Halsbury's* Laws of England, 3rd Edition, Vol. 38, 10, 11 ""Business' is a wider term than, and not synonymous with, trade; and means practically anything which is an occupation as distinguished from a pleasure. Profit or the intention to make profit is not an essential part of the legal definition of a trade or business; and payment or profit does not constitute a trade or business that which would not otherwise be such." Again, in *Rolls* v. *Miller*[10] at page 88 Lindley L.J. said:

"The word 'business' means almost anything which is an occupation, as distinguished from a pleasure — anything which is an occupation or duty which requires attention is a business."

In *Re Griffin, Ex. p. Board of Trade,*[11] Lord Esher M.R. said at page 237:

"Whether one or two transactions make a business depends upon the circumstances of each case. I take the test to be this: if an isolated transaction, which if repeated would be a transaction in business, is proved to have been undertaken with the intent that it should be the first of several transactions, that is, with the intent of carrying on a business, then it is a first transaction in an existing business. The business exists from the time of the commencement of that transaction with the intent that it should be one of a series."

I am abundantly satisfied from the above that by his undertaking to obtain the land in return for the issue of shares and the promise to form a company for the hatchery project he had begun an engagement in a 'business'.

At the conclusion of the prosecution case I was satisfied beyond reasonable doubt that a case of corrupt practice had been made out by the prosecution against the 1st accused not only in respect of using his public position for his pecuniary advantage but also for actual profit contrary to Article 7(10) of the State Constitution. I was also satisfied that an amendment of the charge at the stage should be desirable to bring it in line with the proven facts. Accordingly I framed an amended charge as follows:

"That you on 2nd October, 1974 in the State Executive Council, Malacca, in the District of Melaka Tengah, in the State of Melaka, being a member of the Administration, to wit a member of the Executive Council, Melaka, committed corrupt practice in that you while being such a member used your office for your pecuniary advantage, namely, participated in the deliberation for approving an application for State land in the Mukim of Kuala Linggi, Alor Gajah, Melaka, prepared by one Mohd. Noor bin Baba and submitted in the name of one Kipah bte Othman on 2nd March, 1974 and in respect of such land in which you were engaged in business you did take part in a decision likely to affect your pecuniary interest therein, and that you have thereby committed an offence punishable under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970,"

and I called upon the 1st accused to enter his defence.

Case against 2nd accused:

To succeed in their charge of abetment against 2nd accused, the prosecution will have to, in addition to the proving of the case against 1st accused, show that he instigated, conspired or aided the 1st accused in the commission of the offence. He must be shown to have knowledge of the consequence of his act — *National Coal Board* v. *Gamble*[12] and intention to aid.

I find the following evidence pertinent towards drawing the correct inference against the 2nd accused. On or about February 23, 1974 he dictated and asked his niece Kipah to type out a letter of application for a piece of land with the tracing obtained by 1st accused annexed to it. Such an act would have been perfectly legitimate had it not been for the fact that it was the 1st accused who chose the area and obtained the tracing of the proposed hatchery and not himself. He would appear therefore to be carrying into effect the step next to the one begun by the 1st accused. Then, following this event, he went about to contact businessmen in Singapore to put forth the plan for the proposed prawn hatchery using the land applied for as the consideration for the large capital, expertise and shares negotiated for himself, 1st accused and his other nominees. It was not disputed that when the negotiations were first commenced, the land was

a long way off from official consideration, let alone approval. Yet the 2nd accused was confident of the outcome in favour of the applicant. In the undisputed words of one of the investors (PW23):

"In 1974 the 2nd accused approached me with an idea to set up some venture. The venture was about a piece of land... Accused 2 said it was a good land and *would be given* as a concession to a Bumiputra."

The same witness also testified at a later stage that 2nd accused said "*he would get* the land." and that "when I was introduced to 1st accused I had the impression that the land was not given but *going to be given.*" This conduct of the 2nd accused is sufficient, to my mind, not only to denote that he was aiding the 1st accused in getting the application before the Executive Council but also by his extraordinary show of confidence, he had shown that he knew or must have known that the 1st accused would exert his official influence to get it approved.

Another incriminating inference could be drawn from his keeping the records of the project in a file (D14) in his General Enterprise office, allowing the company's address to be used as a postal address and taking the 1st accused into partnership of the company.

His conduct above and his apparent interest in the company as well as his solicitation of shares for the 1st accused have led me to the unequivocal inference that he was abetting the 1st accused in both ways by aiding and conspiracy. I am satisfied beyond reasonable doubt that the prosecution had made out a case against the 2nd accused as well. A consequential amendment to the charge against this accused was necessary in view of the amendment made to the charge against the 1st accused. In exercise of my powers under section 158 of the Criminal Procedure Code I amended the charge to read as follows:

"That you on the 2nd October, 1974 in the District of Melaka Tengah, in the State of Melaka, abetted the commission of an offence of corrupt practice by one Haji Abdul Ghani bin Ishak who, while being a member of the Administration, to wit a member of the State Executive Council, Melaka, participated in the deliberation in the said Council for approving an application for State land in the Mukim of Kuala Linggi, Alor Gajah, Melaka, in which the said Haji Abdul Ghani bin Ishak had a pecuniary advantage and in respect of which he was engaged in business, which offence was committed in consequence of your abetment in that the application for the said land was prepared by you and submitted by one Kipah binti Othman and that you thereby committed an offence punishable under section 109 of the Penal Code and section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970."

Both accused persons did not wish to recall any witness but on defence being called counsel for 1st accused made an unprecedented request to make further submission of no case to answer. The request was granted despite objection from the prosecution.

The 1st accused elected to give evidence on oath. He started his defence with an account of his illustrious career as a politician from 1959, when he left his previous occupation as a Malay School Teacher, right up to August 21, 1976 when he acted in the office of the Chief Minister, Malacca. He had won his seat as a Member of Parliament on an Alliance Party candidacy in 1959 and 1964. In 1969 he was a Member of the State Assembly and was appointed to the State Executive Council in 1972 and again in 1974. He next related the four awards that he had received — A.M.N. in 1959, J.P. in 1972, P.B.S. (*Pingat Bintang Sarawak*) in 1974 and J.M.N. in 1977.

Referring to the case against him, he said he had obtained the tracings for the land applied from the District Office, Alor Gajah at the request of 2nd accused whom he had known since the 1930's. He said that in his capacity as Wakil Rakyat he often visited the District Office in connection with meetings and other matters related to his post. At times he would do favours for people in his constituency to pay their quit rents and hand in their application letters. In short he was an accommodating and helpful politician. I found this story to be improbable and unlikely to be true. Even as an accommodating and helpful politician as he wanted the court to believe, it could not have been possible for him to choose a piece of land for another person without knowing its exact location and area required and its intended area. He said he first saw Kipah in February or March 1974 when she was at General Enterprise, which was housed in the same building as his Syarikat Serbaguna and which used the same stairways as his. He first spoke to her when she wanted a lift in his car to Alor Gajah. When they were on their way she mentioned that she was going to the District Office. Because he was familiar with the place and the officer he showed her the way. He was invited by the Assistant District Officer into the office together with Kipah because, as he said, the office was quite big. Only then he realised that she had wanted to apply for a piece of land. A clerk in charge of land, Stanley Gui, gave her some form and questionnaire. Kipah had no pen, so Stanley Gui filled up the form and the 1st accused assisted her to fill up the questionnaire. Both documents were later signed by Kipah. He wanted to fill up her address as Lubok Medan but she showed him the District Officer's letter which gave her address as Bangunan Mara. So he wrote the address.

In short the defence explanation in this particular matter was that 1st accused took Kipah to the District Office, Alor Gajah by chance, not by design or pre-arranged plan, that he was not aware of her ultimate destination until she was in his car and thirdly he had no "knowledge" that she was applying for the land until they were in the District Office.

I am unable to accept the story as being truthful or consistent with the conduct of an innocent man. Here is a man who was cautious about preserving his reputation as a reputed political figure, gentle and considerate and extremely concerned about keeping secret his intention of taking a second wife in order to prevent hurting his first wife. Yet he was prepared to throw both respect and reputation to the winds and take an unaccompanied young unmarried girl of 19 to whom he had just spoken for the first time in his car all the way from Masjid Tanah along a lonely stretch of kampong road to Alor Gajah. All this for the purpose of being accommodating and helpful to his people. Surely there could be more to this! Similarly I find it improbable that they could have travelled a distance of about 10 miles without conversing at least on the purpose of her visit. Even

assuming this to be true I nevertheless find no reason for him to use his own pen to fill up the questionnaire form for her because Stanley Gui, who was then filling up the other form for her, obviously must have possessed a pen. It is equally strange to note that when filling the questionnaire he said he was about to write her address as Lubok Medan when she showed him the address she had given the District Officer was Bangunan Mara. If 1st accused's version that Kipah was almost a stranger to him is to be believed, then how could he be aware of her home address? This only leads to the conclusion that he had known her well enough before the trip to Alor Gajah.

On the subject of his marriage to Kipah the 1st accused contended that it was purely for the purpose of begetting children of which he had none. He said his first wife bore him no child and they had only adopted a girl. The purpose of keeping the marriage secret, as mentioned earlier, was to avoid hurting his 1st wife and to prevent the incident from tarnishing his good political reputation and image. He admitted filling up Schedule C (Exhibit P20) which was intended to be filled up by an Imam or Juru Nikah of the District in which the intended bride resided but explained that the Kathi had agreed to his doing so when he explained that he wanted to keep the matter from the knowledge of too many people. He also admitted filling up the name of Durani bin Sahak in the application for solemnising marriage outside Malacca (Exhibit P23) and explained that he had wanted to get married in that name because he was proud of that name, it being the one appearing in his birth certificate.

Here again, I am unable to accept the 1st accused's version to be the truth or likely to be the truth. During cross-examination it was revealed that he had taken a second wife, who bore him a daughter in 1960 and that he subsequently divorced her. This daughter has since sat for and completed her M.C.E. examination last year. When confronted with this issue the 1st accused resorted to splitting hairs by saying that what he had meant by not having children was not having a son. As for the filling up of Schedule C, the 1st accused as a school teacher and Executive Council member and Member of the Religious Council must have known that he was doing something wrong. Even if he did not, the Kathi's evidence showed very clearly that 1st accused had insisted on filling up the portion himself by saying that as an Executive Council member and J.P., he had power to do so. I accept the Kathi's evidence on this. On the issue of using the name "Durani bin Sahak" instead of his usual N.R.I.C. name too I reject the 1st accused's version. It is both unreasonable and illogical that a man should particularly feel proud of using a name in which he was known to the public in a marriage solemnised in secrecy. It is strange that a man so proud of his original birth name should forsake it in times of success but chose to be proud of it when he was marrying secretly for the third time.

I am convinced from the above conduct that the 1st accused was prepared to go to great lengths to get married to Kipah immediately and it did not matter to him if, in the course of doing so, he would be committing the offence of forgery or cheating. Neither was he modest about his position and power. His determination to get married soon only adds up to my previous finding that he had a pecuniary interest in the application submitted by her.

Regarding the circumstances relating to the issue of his personal cheque, the 1st accused had this to say:

> "A day before November 18, 1974, one or two days, my wife handed to me cash $3,631 and she mentioned she got the money from her uncle for land premium and others. She handed over to me the cash. The land referred to is the land discussed at EXCO in 1974.
>
> I kept the money temporarily and on November 18, 1974 I went together with her to Alor Gajah and paid $3,631 to the officer at the Land Office, Alor Gajah."

This I find did not explain why he had taken such a big sum of cash which exceeds the normal monthly income of an Assemblyman.

This evidence, viewed in conjunction with the agreement (P27) to reimburse Kipah for that exact amount leads one to the irresistible conclusion that the premium was in fact paid by the 1st accused using his own personal cheque. I reject his version that it was merely there to remind 2nd accused that the money had been paid by him.

On the subject of formation of Syarikat Samasetia, 1st accused said 2nd accused and a group of persons came to his office in November or December 1974. They discussed about 2nd accused and others wanting to incorporate a company. They asked for his views on formation of the company and a suitable lawyer to prepare for its incorporation. He remembered that Mr. George Taye, the former Secretary of the Alliance, had a lawyer son and so telephoned the latter and informed him that 2nd accused would be calling and arranging for 'other matters'.

What was intended to be conveyed in the defence here was that the accused knew about the company and agreed to participate only in November or December, after the land had been approved. I have dealt with this question in my finding of fact earlier and I had concluded from the testimony of various witnesses that the meeting between them took place before the land was approved. I have considered this finding with 1st accused's assertion that it took place in November or December, but found that it had not raised any doubt on my previous conclusion drawn from the prosecution case.

In his defence the 1st accused explained why he had struck Kipah's name from the list of shareholders of Syarikat Samasetia just before incorporation. According to him he did so for fear of having to pay for her shares as she was by then his wife (as known to him only). I find this claim to be quite absurd because all along he knew that the land was applied for and given to Kipah. After the meeting was held, and before the incorporation, he knew that the main purpose of forming the company was to build a prawn hatchery on the land and one of the conditions stipulated at that meeting was that she should get 10% free shares and be appointed to the Board of Directors. Even assuming for a moment that he was unaware

of the facts then, would the other members not explain the arrangements to him, instead of allowing him to strike out her name arbitrarily. No doubt, they could have kept silent because she was his wife then but the 1st accused had carefully stated that none of them was aware of the marriage at that time.

I hold the view that the position and status of Kipah was known to all concerned and the signing of the agreement (P27) between Kipah and Syarikat Samasetia was a mere device to cover up the authority so frequently exercised by the 1st accused over her interests in the land. Throughout the negotiations and during the formation of the company she was never present. Nevertheless the Board of Directors under the chairmanship of the 1st accused had made various decisions affecting and encroaching on her rights as landowner. In the Board meeting on February 4, 1975 for instance the Board decided unilaterally to place machinery, organise the prawn ponds and build temporary wooden sheds on her land without any evidence of previous consultation with her. Then at the meeting on February 25, 1975 they decided to make her a Director and pay for all the expenses she incurred including assessment on land.

On the question of his participation in the Executive Council meeting on October 2, 1974 the 1st accused agreed that he was present and took part in the discussions, but contended that he had not offended any law. He argued that he had no interest in the land application and had no business or trade to which the application related. His reason for supporting it was due to the Government policy to encourage Bumiputra participation in business. He interrupted his counsel's leading questions to add a further reason that it was also the policy to approve applications for land that gave no profit to the Government and which did not answer to the policy of the Green Book. He said he did not influence any member of the Executive Council into accepting the application and that there were no real objections and the then Chief Minister had supported the application.

In other words, 1st accused contends that mere speaking in support did not constitute an offence under the first limb of the corrupt practice. I do not agree with this contention. The 1st accused was charged with using his public position for his pecuniary advantage and what really matters is whether he used his position for that advantage. It is quite immaterial whether his speaking in support resulted in the approval being given. The important ingredient is that he used his position as an Executive Council member to urge the Council to approve it and knowing fully by that time who the girl was, I do not think he was naive enough not to appreciate that the policy of encouraging Bumiputras in business could not be applied indiscriminately to all Bumiputras irrespective of their financial position and capabilities. By doing so he had suppressed his true position.

As regards the second limb of corrupt practice, i.e. taking part in a decision likely to affect his pecuniary interest, I have already discussed this at the close of the prosecution case. The defence confirmation that he took part will serve to strengthen further the findings of fact on this issue.

I am of the view that the offence of corrupt practice is committed if a member of the administration does any act contrary to the provisions of the State Constitution. Firstly, he had a trade, business or profession and he took part in any decision relating to that trade etc., and secondly, if he took part in any decision likely to affect his pecuniary interest therein. In the first case the degree of influence exerted on the decision is immaterial. It is only necessary to prove that he has a trade, business or profession and he participated in the decision making. In the second limb it is not necessary that the decision is directly related to his business etc. but it must be shown that the decision he participated in will probably affect his pecuniary interest in the trade, business or profession.

In our present case I am satisfied that the 1st accused has committed corrupt practice and offended both limbs of the acts prohibited by Article 1(10) of the Malacca State Constitution.

A somewhat similar restriction as appeared in the State Constitution is to be found in section 76(1) of the U.K. Local Government Act, 1933 (now repealed). The section reads:

"If a member of a local authority has any pecuniary interest. ...."

In the case of *Brown* v. *Director of Public Prosecutions*[13] six of the Councillors after declaring their interest voted in amending a resolution. Lord Goddard C.J. observed:

"These six persons did disclose their interest... it says they must not vote on any matter in which they have a pecuniary interest."

This view was similarly applied in *Rands* v. *Ordroyd, supra,* where at page 350 Cassels J. observed:

"It is no answer to say that the particular councillor had no pecuniary advantage to obtain by recording his vote."

In my opinion the same reasoning applied in our present case. Article 7(10) of the Constitution of the State of Malacca reads:

"A member of the Executive Council shall not engage in any trade, business or profession connected with any subject or department for which he is responsible and shall not, so long as he is engaged in any trade, business or profession, take part in any decision of the Executive Council relating to that trade, business or profession or in any decision likely to affect his pecuniary interests therein."

It appears from the above that if a member has pecuniary interest in any matter before the Executive Council and chooses to take part in the discussions he has violated this provision. It is immaterial if he spoke for or against it and it does not make the offence any lighter if the ultimate decision is against him.

As a second witness for his defence the 1st accused called Dato' Setia Hj. Abdul Ghani bin Ali, the former Chief Minister of Malacca. Having seen and heard and observed his demeanour in the witness box, I feel compelled to say that if he was a good politician of his era, his performance in the box was a bit of a disappointment. He appeared to me like a person walking on a tight rope balancing himself ever so carefully not to lean too much to his left or right for fear that he might trip and hurt himself. I must

not deny him of the compliment of being polite and courteous to the court, but he certainly was evasive, offered little evidence of appreciable conviction in most matters and his testimony was punctuated with 'I don't remember; I think so; It is possible' and so forth. If he recalled something was said, he forgot who said them and when he remembered he said something, he was unable to say when they were uttered. Other than that the decision was unanimous and the 1st accused did not influence him into supporting the application, this witness's testimony is of no appreciable value to the 1st accused. The two matters he mentioned would not make any significant change in the prosecution case insofar as the charge of participation in the decision is concerned.

The 1st accused called Chua Po, one of the Directors and shareholders of Syarikat Samasetia, to support his contention that the first meeting was held in November or December 1974. The witness, however, appeared to be very uncertain when answering questions. When asked by defence counsel whether it was his first meeting with the accused in November/December, he answered with a firm yes but when asked whether it was also the 1st accused's first meeting with Lim Thor Lung and Victor Khoo, he answered vaguely 'I think so'. When asked whether he had met 1st accused at the Palace Hotel as testified earlier by Lim Thor Lung, he replied that he could not remember because of the lapse of time. He agreed with the Deputy Public Prosecutor that it was possible for Lim Thor Lung to have met 1st accused prior to the meeting in November/December. As stated earlier, the witness not only appeared vague and uncertain, but had also admitted that he could not remember because of lapse of time. I have no hesitation therefore in preferring Lim Thor Lung's evidence to his.

Another witness called by the defence is Datuk Johari. His evidence does not appear to give much significance to 1st accused's case save that he (the witness) supported the application, that there was no objection but queries when the application was considered and that the application was finally approved.

I have considered the 1st accused's case as made out against him by the prosecution in the light of his whole defence and his counsel's submission. I have even considered possible unintentional slip-ups or errors in his evidence — this being his first time in court — but there was no room for doubt in my mind. The 1st accused is a cunning and guileful witness. As a Malay educated person he sprang frequent surprises by supplying English words to the court interpreter whenever the translation did not go his way. His answers to cross-examination were slow and calculated and at times bordered on the fringe of sarcasm.

I am aware that the duty placed on the defence is a light one and that the case rests on circumstantial evidence. If I may borrow the expression of Thomson C.J. as he then was, in *Chang Chwen Kong* v. *Public Prosecutor*[14]:

"The evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. This is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hand the prisoner?"

My considered answer is in the affirmative. I am convinced that there is a mass of cogent circumstantial evidence which must point irresistibly to the guilt of the accused. The 1st accused's defence has not raised sufficient doubt in my mind as to the prosecution's case and I find him guilty.

The 2nd accused gave evidence on oath. He said he came from Kg. Lubok Medan and had known 1st accused, who was engaged as a teacher then, since his school days. He finished schooling in 1950 and in the following year left for Singapore to look for a job. He began his career as an office boy at East Advertising and slowly rose in rank until he became the media manager in 1973. By then he was a Singapore citizen. In the course of his work he came to know Victor Khoo. Sometime in 1972 he had read in a newspaper about an area in Kuala Linggi being turned into a prawn hatchery project. He had kept the idea in mind until mid-1973 when he discussed the matter with Victor Khoo and enquired from him if there was any expert who could deal with the project. He contended that at that time he had no land and they were just talking about the project. In January 1974 he came to Malacca having resigned from his job as media manager and he drafted a letter to the Chief Minister requesting for land for a prawn hatchery. That application was made by General Enterprise, a partnership formed by him and his brother Daud in 1970. It was then known as General Publishers. In 1972 its name was changed into General Enterprise. In 1974 the same company was enlarged to 5 persons including the 1st accused. He said he next met 1st accused in a coffee shop and requested the latter to obtain the tracing for him instead of going personally or asking his brother Daud to go, because an Assemblyman could get things done expeditiously. He drafted a letter of application for land to be used as a prawn hatchery in the name of his niece Kipah. He said he had decided to apply again in Kipah's name without waiting for a reply to his first application because he believed that as a Singapore citizen he would not be successful. He promised Kipah free shares in the company he was going to incorporate if the application was favourable. In June or July 1974 he said he was introduced to Lim Thor Lung (PW24) by Victor Khoo as an expert in prawn hatchery project. He informed PW24 about his application and invited him to participate in a joint venture. He met Chua Pa (DW4) in the same month in Singapore. He claimed he met Lim Thor Lung again in November 1974 to request for money to form a company and was given $7,000 cash. He denied that Lim had sent it by T.T. to him in Malacca. He first gave the reason that Lim had given an untrue account of this because he was angry with him for the failure of the project but later agreed to counsel's suggestion that Lim could have been mistaken. He related how he attached the form to the letter and handed them personally to the Chief

Minister, Encik Ghani Ali. According to him, he had made no appointment as it was unnecessary with the former Chief Minister and that he did not speak anything beyond the words "this is an application for a prawn hatchery" before leaving. He knew nothing about Kipah going to the Land Office with 1st accused and what happened to her application when he saw Lim. He said he gave the money for premium to Kipah plus $10 for her fare about 2 days prior to November 18, 1974. She had shown him a slip of paper and informed him verbally. He agreed the slip is not enclosed in D14. He also claimed that he knew 1st accused as an Assemblyman and not as an Executive Council member. He said he was ignorant of the fact that the Executive Council approved applications for land and that he had known about this only after his younger brother told him when he was about to join the UMNO in 1976. He was not listed as a shareholder but he contends that he had been promised shares. He denied knowing that the 1st accused would take part in the Executive Council meeting in respect of the approval, nor did he suggest to him to do so.

The 2nd accused's defence was obviously intended to convey that the 1st accused had no knowledge or interest in the application until after the Executive Council approval and that even if the 1st accused did, he had no knowledge or was ignorant of what influence the 1st accused could have possibly exerted.

The finding of fact on 1st accused's knowledge and interest had been fully discussed when considering his defence. So I shall only deal with the other aspect of his defence, viz. whether his defence could raise any doubt in my mind as to the inference I have drawn against him at the conclusion of the prosecution case.

I found the 2nd accused's story to be inconsistent and discoloured with untruths. I think it is most unlikely that a man who had left his kampong to get an employment in another country, who had worked diligently his way from peon to manager in 24 years and who had in the course of which adopted the citizenship of that country — forsaking his own birth rights, should just discard all the hard earned comforts and security of life in order to try his luck at the same place which previously denied him gainful occupation. No man of intelligence, acumen and resilience as the 2nd accused would have taken such a big step unless, of course, with assurance of future gains. The resignation from employment and his departure from Singapore coincided with the request for tracings, the application for land by Kipah and his subsequent negotiation with the Singaporeans for a joint venture, the immediate reaction of the Chief Minister to the application personally delivered and the enlargement of General Enterprise to include 1st accused, are unmistakable inferences pointing towards a pre-conceived plan involving the 2nd accused.

Another matter of relevance is the 2nd accused's claim of absolute interest in the application. He said that his application and the project were totally his idea to the exclusion of the 1st accused. Yet, for an originator, prime mover and planner, he only obtained a promise of 10% shares and was not even considered to be a Director or even appear on the list of subscribers of the company.

His claim of ignorance of the 1st accused's position as an Executive Council member is in contradiction to the evidence of PW23, Victor Khoo, which ran as follows:

"He introduced him to me and said he was interested in joining the company and that he was an EXCO member of Malacca. We thought as a head of the company an EXCO member would lend some weight."

Victor Khoo's testimony on this was not only unchallenged by both 1st accused and 2nd accused but was quite logical towards showing why the Singaporean had considered 1st accused as an obvious choice as Chairman of the Board of Directors.

I accept this witness's version in preference to the 2nd accused's and find his claim for absence of knowledge to be ill founded.

Regarding the admission of the 1st accused and 4 others into General Enterprise, he stated that the intention was to increase the capital of the company, but on cross-examination disclosed that 1st accused paid nothing at all, that two out of the other four had none to offer and the one which was supposed to bring in capital to the company only gave a loan to 2nd accused. In the absence of any reasonable explanation on this I would draw the inference that there existed a conspiracy between 1st accused and 2nd accused to participate in the business transaction. At one stage in the cross-examination the 2nd accused agreed that he had used Kipah's name in order to conceal the political backing behind this application but denied that such backing came from 1st accused. This would appear to go against his earlier contention that the application made impromptu was just to try his luck and not carried out from a pre-arranged plan.

Another serious discrepancy in 2nd accused's evidence is regarding Exhibit P27, the agreement between Kipah and Syarikat Samasetia. The 2nd accused explained that the purpose of executing it was to get the company to reimburse the premium of $3,631 to Kipah, who would then refund the money to him and he would, in turn, credit it into the company's account. This would appear to me to be quite illogical as the $3,631 came from the same source, i.e. monies advanced as part of the company's capital by Lim Thor Lung. Since it has been paid out of the company's money, there is no reason why the company should make any payment again as this would tantamount to making the company pay twice over for the same thing. The inference I draw from this would only fortify my earlier finding about the agreement (P27).

There were other inconsistencies and discrepancies in the 2nd accused's story relating to the T.T. by PW24, his reason for the project failure and others which, if I were to discuss in full detail, would add more pages to my already lengthy judgment. Suffice it to say that for the various discrepancies, contradictions and inconsistencies I disbelieved him and rejected his story and accepted those of the prosecution. I am convinced that the 2nd accused's contraditions etc. were not occasioned by error possi-

bly made by one who found himself for the first time in court. The 2nd accused appeared to me to be much at home in the witness box.

The 2nd accused's defence has not given rise to any doubt in my mind as to the prosecution case. On the contrary, I find that his story served to fortify my earlier findings that he had knowledge and intention to conspire with the 1st accused. I find the charge as amended against him proved and I find him guilty.

Sentence:

(To accused 1)

The imposition of punishment has always been an unsavoury part of my duty, especially when the offender is a public figure supposedly possessed of high moral ideals. However unpleasant it may be, it is nevertheless a duty which I owe the public and which they in turn can expect from me.

You are a well-known figure in this part of the country and as such I cannot refute absolute knowledge of your personality. But every member of the judiciary who elects to don his robes of justice and ascend the bench must learn to discard his personal feelings for absolute impartiality. With that feeling I have heard your case and with it I now approach to consider your sentence.

It is distressing to note from the evidence that from the exalted rank of an honourable freedom fighter of which you once occupied the front line, you have plummeted down to the venal degradation of a pocket liner. This country has piled upon you honour after honour but they meant nothing to you in your avid desire to corrupt wealth. You were a political asset to the people who elected you but you misused the influence and trust they placed upon you. You have demonstrated with stunning agility your aptitude to obtain simultaneously wealth and wife through unparallelled artifice.

The entrenched principle of our criminal law requires that punishment be imposed with the two fold object of punishing the offender from repeating his crime as well as to deter other members of the society from committing the same.

The offence of corrupt practice has been enacted by the legislature for the avowed purpose of maintaining the highest standard of integrity amongst members of the administration. It is intended to prevent persons entrusted with discretion and powers of governing from not only exposure to temptation but also a semblance of temptation.

My sentence therefore must reflect the gravity of the offence and serve as a warning to those who have so far eluded the powers of detection that the day of reckoning will surely arrive and often sooner than they think. Remember the law is no respecter of persons.

There are three ways of preventing an offence — by incapacitation, reformation and intimidation and the one that fits this is imprisonment.

I sentence you to 1 year's imprisonment.

(To accused 2)

You are a man who has ascended the long and hazardous ladder of success with indomitable determination. Your perseverance through life from the position of a penurious peon to that of managerial personnel of a firm must indeed earn you admiration. But somewhere along the path towards your struggling success you were infected by the defiling desire for instant prosperity. Thus inflicted you greedily abandoned your home and occupation that sustained you for 24 years past to search for what you expected to be an unlimited gain. You were not bothered in the least by the morality of your conduct. You conspired with the 1st accused and provided a perfect cover for his felonious activities. He was a teacher in the school in which you were a pupil. In my judgment he still is. Your loyalty for him, no doubt, has earned you your conviction today.

Like him the proper punishment for you is imprisonment. I have not overlooked that you did not get the lion's share. The sentence upon you therefore will be proportionately reduced.

I sentence you to 7 months' imprisonment.

From the above judgment the appellants appealed to the Federal Court.

FEDERAL COURT.

Edgar Joseph for 1st appellant.

2nd appellant not represented.

Suriyadi Halim Omar (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): The 1st appellant was convicted of an offence of corrupt practice under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 and the 2nd appellant was convicted of abetting the offence. We concede that the facts on which the learned judge relied for the convictions were largely circumstantial. But there was also direct evidence in the case of the 1st appellant that he participated in the deliberation of the Melaka Executive Council (Ex. Co.) meeting held on October 2, 1974 when the meeting considered the application of Kipah binti Othman (PW27) for 500 acres of State land for the purpose of prawn hatching. This direct evidence was by his colleagues in the Ex. Co. PW19, Haji Abdul Aziz bin Haji Alias, PW21, Datuk Yeaw Kay, and PW22, Datuk Mohamed Di bin Abdul Ghani. All these gentlemen were categorical in their statements that the 1st appellant urged the Ex. Co. to support the application on the grounds that it was their "duty" to support bumiputra venture. Incidentally, it is also in the evidence of PW19 that the 1st appellant was then the most senior bumiputra Ex. Co. member at that time.

The evidence revealed that a number of events happened on or about the month of January 1974 relating to a proposed prawn hatchery business and an application for State land culminating in the Melaka Ex. Co. meeting of October 2, 1974 and the subsequent formation on March 20, 1975 of a company

called Syarikat Samasetia Sdn. Bhd. to undertake the business of prawn hatching on the land concerned. The events would appear unconnected but on close examination they produced an irresistible inference that they were part of a grand scheme to put into effect the objects of the agreement between Kipah binti Othman and the company, Syarikat Samasetia Sdn. Bhd. dated September 2, 1975 (Exhibit P27). The general objects of this agreement were for Kipah binti Othman, as owner of the land approved to her by the Melaka Ex. Co. on October 2, 1974, to grant to Syarikat Samasetia Sdn. Bhd. as licensee the full right and liberty to establish and maintain hatcheries of prawns both marine and inland for the sale by wholesale or retail with the right to traverse and use the banks and reaches of the proposed hatchery for any purposes reasonably necessary for the exercise of such right.

The events started sometime in January 1974 both in this country and in the Republic of Singapore. In Singapore the 2nd appellant, who was the general manager of a firm known as General Enterprise, approached one Victor Khoo (PW23), the Assistant General Manager, Times Publishing, Singapore, with an idea of setting up some sort of joint venture between Malaysians and Singaporeans. The venture was in the form of a business proposition to set up a prawn farm on a piece of land which it was said could be obtained from the State Government. PW23 testified that the 2nd appellant said that it was government land but would be given to a bumiputra and there was discussion as to the proportion of shares to be divided between the Singaporeans and the Malaysians. The proposed recipients of the shares included the 2nd appellant, Kipah binti Othman, one Zakaria and the 1st appellant. It was also in the evidence of PW23 that in the discussion between him and the 2nd appellant, the 1st appellant would be given 10% share but he had to pay for it and that most of the capital would come from PW23 and PW24. Subsequently the company was in fact formed as Syarikat Samasetia Sdn. Bhd. and the 1st appellant became the Chairman, PW24 became the Managing Director, and PW23 became the Treasurer/Director.

In Melaka itself certain events pertaining to a land application also took place around the same period. According to PW5, Stanley Gui (a Settlement Officer in the District of Melaka Tengah) sometime in January 1974 in the morning the 1st appellant came to the Land Office in the District of Melaka Tengah and wanted to see a plan (Exhibit P6). After looking at the plan the 1st appellant said he wanted a copy of the plan and was given one after paying the necessary fee. Soon thereafter this witness saw the 1st appellant again but this time in the office of the Assistant District Officer (PW7). The 1st appellant was then in the company of a young lady Kipah binti Othman, aged 19 years, (PW27). This was on March 2, 1974.

In fact evidence showed that on February 23, 1974 the 2nd appellant drafted a letter (Exhibit P6) and requested Kipah binti Othman, PW27, who was his niece, to type it and sign it in her name (Exhibit P6A). This letter was dated February 23, 1974. Apparently the letter was sent immediately to the office of the Chief Minister then who, as shown on the top of the letter, immediately directed the District Officer Alor Gajah to forthwith process the application "as soon as possible." It is pertinent to note that this written minute of the Chief Minister was also dated February 23, 1974, i.e. the same day as the application. Then significantly, exactly four days later, on February 27, 1974, with an efficiency perhaps unheard of in the history of land administration in this country, the Assistant District Officer wrote to Kipah binti Othman asking her to be present at his office in connection with the application (Exhibit P6A). It was in response to this letter of the Assistant District Officer that on March 2, 1974 Kipah and the 1st appellant travelled together in the 1st appellant's car from Masjid Tanah to Alor Gajah Land Office to fill up an application form (Exhibit P6C) and the questionnaire form (Exhibit P6F) both in connection with the same application for State land. After this the government machinery in relation to this land application again moved with undue haste. Thus it was possible for the Ex. Co. paper to be prepared in time for its meeting on October 2, 1974 to consider the application for land by Kipah binti Othman. If we may digress, public authorities have acquired a reputation for being ponderous giants whose administrative processes cannot be hurried. It is public knowledge that the administrative process required for an application for a piece of land leading up to the preparation of the necessary Ex. Co. paper normally takes quite a considerable time, sometimes it may even stretch up to 2 to 3 years. This process was in fact explained by the Principal Assistant Secretary (PW20) in his evidence. First, the application is made to the Collector of Land Revenue where the land is situated. The Collector of Land Revenue then examines the application and when satisfied with it accepts the application in accordance with all the rules laid down under the Land Rules, Melaka. The Collector of Land Revenue will then cause the application to be investigated by the Settlement Officer by way of physical inspection of the land. The Settlement Officer will then submit his report to the Collector of Land Revenue. The Collector of Land Revenue will then refer to the various relevant departments for their opinions and views. After receiving all these opinions and views the Collector of Land Revenue would prepare an Ex. Co. paper to be submitted to the Ex. Co. through the Director of Lands and Mines with his recommendations for consideration of the Ex. Co. Normally the file will go to the Chief Minister for his consideration whether it should be submitted to the Ex. Co. or not.

Anyone looking at the evidence would come to an irresistible conclusion that the application by PW27 was certainly not treated as an ordinary application for land for the whole machinery of the administration from the highest level of the Chief Minister to the lower level of the Settlement Officer seemed to be in top gear throughout.

From the evidence of the witnesses who were present at the Ex. Co. meeting on October 2, 1974 it would also seem clear to us that despite one or two objections the application was approved without much

consideration. The learned judge in his judgment seemed to put some significance on the rather high-handed manner in which the Chief Minister asked the meeting whether to approve the application or not. We are inclined to agree with the learned judge that it was apparent from the evidence and the minutes of the meeting that the application would in any case have been approved. As it turned out the application was approved although the area was reduced from 500 acres to 200 acres.

Another significant event which took place during the material period was the secret marriage between the 1st appellant and the applicant, Kipah binti Othman. There was no evidence adduced by the prosecution that the 1st appellant had known Kipah before the occasion he took her in his car to the Land Office in Alor Gajah on March 2, 1974. Of course it was in the 1st appellant's own evidence when he was called upon to state his defence that he had known Kipah slightly before that date as the latter was working in a firm belonging to her uncle, the 2nd appellant, which business office was situated in the same building as the 1st appellant's office. From the marriage certificate (Exhibit P25) it is clearly shown that the 1st appellant married Kipah on October 5, 1974 which was about 3 days after the approval of the land application by the Melaka Ex. Co. Three aspects of his marriage deserve mention. First, the marriage was conducted not in Melaka but in the Federal Territory of Kuala Lumpur and the 1st appellant had made all the necessary arrangements to enable this to be done. Secondly, the name which 1st appellant used for the purpose of the application for marriage was not his official name but the name "Dorani bin Sahak" which according to him was the name he was known before he became a politician. Finally, the 1st appellant probably to maintain the secrecy of the marriage, authenticated his own marriage form himself and when asked by the Alor Gajah kathi about the propriety of it, stated that his appointment as Justice of the Peace would in any case empower him to do so. All these are in our opinion a useful indicator to the type of person the 1st appellant is. The learned judge said in his judgment the 1st appellant "risked the charge of forgery" by authenticating the marriage form himself if by doing it he could achieve his object.

There was also evidence that sometime in December 1974 the 1st appellant contacted one Mr. George Taye (PW28) and instructed the latter to prepare the Memorandum and Articles of Association of the proposed Syarikat Samasetia Sdn. Bhd. This Memorandum was presented subsequently to the Registrar of Business on February 4, 1975.

Finally, one piece of evidence of crucial importance that none of the defence witnesses could deny would seem to be the fact that the 1st appellant caused the payment for the premium of the land approved to Kipah binti Othman to be made by his personal cheque amounting to $3,631 and that this payment was made on November 18, 1974 which was almost two weeks before the official letter calling for the payment of the said premium was made by the Collector in his letter dated November 30, 1974 (Exhibit P6E). Again we are compelled to say that no ordinary applicant for land can be so promptly informed by the Collector. The defence starting with the evidence of PW27 attempted to establish that the actual payment was made by PW27 with money given to her by the 2nd appellant who had obtained it from PW24 in response to an earlier letter of demand for payment. We think with respect that that is too fanciful a theory, and should be ignored as a possibility: as a conjecture we think it not permissible. The learned judge, after a careful assessment of the evidence as disclosed in his reasons for judgment, did not find favour with the defence version. The decision seems to us so obviously correct and consistent with commonsense that it is difficult to see how the contrary contention could have succeeded.

A number of grounds were raised on behalf of the 1st appellant. We feel that only two points raised need to be dealt with in some detail. Firstly, it was alleged that the amended charge was bad for duplicity. The fallacy of this argument is exposed when one examines the amended charge itself. It reads as follows: —

> "That you on 2nd October, 1974, in the State Executive Council, Malacca, in the District of Melaka Tengah, in the State of Melaka, being a member of the Administration, to wit a member of the Executive Council, Melaka, committed corrupt practice in that you while being such a member used your office for your pecuniary advantage, namely participated in the deliberation for approving an application for State land in the Mukim of Kuala Linggi, Alor Gajah, Melaka, prepared by one Mohd. Noor bin Baba and submitted in the name of one Kipah binti Othman on 2nd March, 1974 and in respect of such land in which you were engaged in business you did take part in a decision likely to effect your pecuniary interest therein, and that you have thereby committed an offence punishable under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970."

It was argued that the charge combines three known offences by importing the provisions of Article 7(10) of the Malacca State Constitution. The charge, it was argued, therefore violated section 163 of the Criminal Procedure Code, and was therefore bad for duplicity.

The expression "corrupt practice" is defined in section 2(2) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 as follows: —

> "'corrupt practice' means any act done by any Member or officer referred to in sub-section (1) in his capacity as such Member or officer, whereby he has used his public position or office for his pecuniary or other advantage; and without prejudice to the foregoing, in relation to a Member of a State Legislative Assembly includes any act which is contrary to the provision of sub-section (8) of section 2 of the Eighth Schedule to the Federal Constitution or the equivalent provision in the Constitution of a State;"

The first question to answer on the definition is whether it is intended to be exhaustive. After carefully examining the definition we are of the opinion that the question should be answered in the negative, that is the definition of "corrupt practice" in the Ordinance is not exhaustive but extensive. In properly considering the definition the words "without prejudice to the foregoing" appearing before the second limb of the definition are important. These words indicate the general intendment of the first limb of the definition. In fact the extensive character of the definition is further enhanced by the use of the word "includes" immediately after the words "in relation

to a Member of a State Legislative Assembly" appearing in the second limb of the definition. The word "includes" is normally used to enlarge the ordinary meaning of a word or phrase beyond its accepted meaning as opposed to the use of the word "means" which is used if the definition is intended to be exhaustive — see *Caldow Props* v. *Low Ltd.*[15] It need not be emphasised that the offence section under the Emergency (Essential Powers) Ordinance No. 22 of 1970 is section 2(1) of the Ordinance and that section 2(2) merely carries the definition of the expression "corrupt practice." One trend in judicial opinion that is discernible in the cases cited is that the courts are more ready to impugn a charge as bad for duplicity where it contains more than one offence in the alternative. The case of *Yap Liow Swee* v. *Public Prosecutor*[16] referred to by counsel on behalf of the 1st appellant is clearly distinguishable in that there were in that case clearly two offences disclosed in the charge as the charge alleged "recklessly *or* negligently." The indictment in *Reg.* v. *Clow*[17] which arose out of a charge alleging that the appellant had caused the death of a person by driving a motor car at a speed and in a manner dangerous to the public was held not to be bad for duplicity as even if the elements of speed and manner of driving constituted separate offences it was permissible to charge them conjunctively if the matter related to a single incident. In *Vernon* v. *Paddon*[18] the issue that arose for determination was whether a charge of using threatening and insulting words and behaviour whereby a breach of the peace was likely to be occasioned, contrary to section 5 of the Public Order Act, 1936, was bad for duplicity and it was held that the statutory provision in question created one offence, the essential feature of which was conduct of any sort which was intended to provoke a breach of the peace or whereby such a breach was likely to be occasioned and that in any event even if the section created two offences, it was open to the prosecution to charge them conjunctively since they arose out of a single incident.

In *R.* v. *George Thomas Johnson*[19] the appellant was convicted under the Prevention of Crimes Act, 1871, section 7, with being "... found in certain public places, namely, Elm Tree Road and Circus Road ..., waiting for an opportunity to commit an offence...." The two roads named adjoined one another. On appeal it was contended *inter alia* that the indictment was bad for duplicity in that it was alleged in one count the appellant had committed two offences, one in Elm Tree Road and the other in Circus Road. It was held by the Court of Criminal Appeal that the form of the indictment did not in the circumstances prejudice or cause embarrassment to the defence and therefore the indictment was not bad for duplicity.

In our view it is clear in the amended charge that there is only one offence of committing corrupt practice and that the rest of the charge merely deals with particularizations. It was the unfortunate use of language in the amended charge by the learned judge which brought about the misconception that there was duplicity in the charge. The charge carries only the offence of corrupt practice alleged against the 1st appellant, i.e., while being a Member of the administration he used his office for his pecuniary or other advantage. That was the charge known to the 1st appellant. It cannot be said that he did not understand it. There is strong reason for thinking, and no reason for denying, that he was not in any way prejudiced. We are satisfied that the particularizations in the charge could not have embarrassed or prejudiced the 1st appellant, although with respect, his use of familiar expressions in relation to that topic might have led to the opposite conclusion. We are also satisfied that the technical irregularity did not cause a miscarriage of justice — see also *Jack Dennis McVitie.*[20] The objection on the ground of duplicity must therefore fail.

The other main ground raised on behalf of the 1st appellant is that the judge had misread the evidence of PW23 and PW24 and therefore came to the wrong conclusion that there was already a "business" existing in respect of the land concerned when the Ex. Co. met on October 2, 1974 and that the 1st appellant was already engaged in that business. The finding of the learned judge on this point appears at page 321 where he said:

"At the conclusion of the prosecution case I was satisfied beyond reasonable doubt that a case of corrupt practice had been made out by the prosecution against the 1st accused not only in respect of using his public position for his pecuniary advantage but also for actual profit contrary to Article 7(10) of the State Constitution."

Here we find that the learned judge was somewhat over-zealous in requiring himself to be satisfied beyond reasonable doubt of more than what was sufficient for the purpose of proving an offence under section 2(1) of the Ordinance. At law to convict the 1st appellant he need only be satisfied that the 1st appellant used his public position for his pecuniary or other advantage and the further requirement to be satisfied on the actual profit contrary to Article 7(10) of the State Constitution would in our view be superfluous. The question now is, was there a "business" offering to the 1st appellant a pecuniary advantage on the date of the Ex. Co. meeting on October 2, 1974? One of the particular persistent problems which we experienced about statutory interpretation concerns definitions, and the courts frequently face questions involving a word or phrase which is either not defined at all or only defined inadequately or, perhaps, over-defined. In the present case the word "business" is without precise definition. Be that as it may, the lack of definition may not always matter much, and in some respects insight might be thought to resemble the proverbial elephant: easy enough to recognise it when seen but difficult to describe it.

We think we have first to examine the object of Emergency (Essential Powers) Ordinance No. 22 of 1970. In *Public Prosecutor* v. *Datuk Tan Cheng Swee & Ors.*[21] this court had occasion to consider the object of Ordinance No. 22 of 1970 and said:

"We consider that our view accords with sound commonsense. The Emergency (Essential Powers) Ordinance No. 22 of 1970 is enacted to widen the campaign against bribery and corruption and now makes a penal offence any practice that comes within the definition of corrupt practice in the Ordinance, which previously would have escaped the net of the Penal Code and the Prevention of Corruption Act."

It is therefore no longer in dispute that the object of the Ordinance is wide so as to bring to book cor-

rupt politicians and public officers who abuse their public positions or office for their pecuniary or other advantage. The use in the Ordinance of the words "pecuniary or other advantage" is significant. The word "other" appearing in the context of the definition is not caught by the *ejusdem generis* rule. We are fortified in this view by the statement of Lord Diplock to this very effect in *Quazi* v. *Quazi*[22] and it might perhaps be useful to set out this part of his judgment in extenso:

"It was not the husband's case that the divorce by talaq was obtained in Pakistan by proceedings that were 'judicial'; it is the reference in the section to 'other proceedings' on which he relied. The argument for the wife is that these words, which on the face of them would include any proceedings that were not judicial, are to be read as limited to proceedings that are quasi judicial, by application of the *ejusdem generis* rule. This involves reading 'other' as if it meant 'similar' and, as it seems to me, is based on a misunderstanding of that well-known rule of construction that is regrettably common. As the Latin words of the label attached to it suggest the rule applies to cut down the generality of the expression 'other' only where it is preceded by a list of two or more expressions having more specific meanings and sharing some common characteristics from which it is possible to recognise them as being species belonging to a single genus and to identify what the essential characteristics of that genus are. The presumption then is that the draftsman's mind was directed only to that genus and that he did not, by his addition of the word 'other' to the list, intend to stray beyond its boundaries, but merely to bring within the ambit of the enacting words those species which complete the genus but have been omitted from the preceding list either inadvertently or in the interests of brevity. Where, however, as in section 2 of the Recognition Act, the word 'other' as descriptive of proceedings is preceded by one expression only that has a more specific meaning, viz 'judicial', there is no room for the application of any *ejusdem generis rule;* for unless the draftsman has indicated at the very least two different species to which the enacting words apply there is no material on which to base an inference that there was some particular genus of proceedings to which alone his mind was directed when he used the word 'other', which on the face of it, would embrace all proceedings that were not judicial, irrespective of how much or little they resembled judicial proceedings."

Therefore the word "advantage" is also to be construed widely. To achieve the object of the Ordinance we are firmly of the view that the court is perfectly justified in construing the word "business" in the widest possible sense. Thus for a business to exist for the purpose of the offence it is not necessary that contracts must have been entered into or transactions must have been carried out or that the business has been registered or that the company has been incorporated. In *Rael-Brook, Ltd.* v. *Minister of Housing and Local Government & Anor.*[23] the judgment dealt with the construction of the word "business" and favourably cited *Rolls* v. *Miller.*[24] Widgery J. (as he then was) said:

"In *Rolls* v. *Miller* a charitable institution called a 'Home for Working Girls' was held to carry on a business in breach of a covenant in a lease against use for business purposes and Cotton, L.J., said:

'There may be a great many businesses, which are not trades, and although, in my opinion, receiving payment for what is done, using what you are doing as a means of getting payment with a view to profit... is certainly material in considering whether what was being done is, or is not, a business yet, in my opinion, it is not essential that there should be payment in order to constitute a business."

Lindley L.J. added:

"When we look into the dictionaries as to the meaning of the word 'business', I do not think they throw much light upon it. The word means almost anything which is an occupation and not a pleasure; anything which is an occupation or duty which requires attention is a business."

In the Oxford Companion to Law the word "business" is defined as follows: —

"Business. An indefinite term covering most kinds of commercial relations, particularly on a substantial scale. It is generally considered wider than trade, which is confined to shopkeeping and the exercise of such skilled trades as joinery and plumbing. Business may be distinct from or may in certain contexts include the practice of certain professions."

A last minute attempt was made by counsel for the 1st appellant to convince us that by construing the word "business" as including a "a business proposition ready for implementation" the learned judge committed a grave error and did violence to the express language of Article 7(10) of the Malacca State Constitution. Counsel cited an array of authorities including *R.* v. *Wimbledon Justices, Ex parte Derwent*[25] where Lord Goddard said:

"Although in construing an Act of Parliament the court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there, and, if the statute has created a specific offence, it is not for the court to find other offences which do not appear in the statute:"

Also cited was *Crawford* v. *Spooner*[26] for the simple proposition that —

"We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there."

In other words, it was the contention of counsel that the learned judge in this case took upon himself to fill the gaps in the statute which it was not his function to do — see *Magor and St. Mellons R.D.C.* v. *Newport Corpn.*[27] and the elementary principle of construction must at all times be adhered to, that is that the language of a statute must never be extended beyond its natural and proper limits in order to supply omissions or defects, nor strained to meet the justice of an individual case. This rule is to be observed strictly in all penal statutes — see *The Gauntlet.*[28]

We have two observations to make on the final submission by counsel. Firstly, the words "a business proposition ready for implementation" appear at page 320 of the record when the learned judge was describing the facts as adduced in the evidence of PW23 and PW24 which had earlier been mentioned in this judgment. A "business proposition" is most inapt to describe all the events that took place which culminated in the formation of the company Samasetia Sdn. Bhd. The view upon which the learned judge proceeded is succinctly expressed in his judgment which appears at page 321 of the record:

"I am abundantly satisfied from the above that by his undertaking to obtain the land in return for the issue of shares and the promise to form a company for the hatchery project he had begun an engagement in a 'business'."

Our second observation is directed to the clear object of the Ordinance which is to cast the net wide so that corrupt politicians and public officers who abuse their public positions or office for their pecuniary or other advantage shall be answerable in a court of law. The 1st appellant cannot now be heard to say that because the statute is penal in character

the word "business" should be strictly construed for that, in our opinion, will defeat the very object of the Ordinance. We are not blazing a trail but merely following a well recognised route. We would echo well known words

> "... and whereas, of course, a consideration of the mischief aimed at does not enable the court to construe the words in a wider sense than they appear, it at least means that the court would not be acute to cut down words otherwise wide merely because this was a penal statute"

— *per* Lord Parker C.J. in *Rands* v. *Oldroyd.*[29]

Although no attempt was made to define the word "business", it seems clear that the courts will take a realistic view of its meaning in regard to which Ordinance No. 22 of 1970 will operate. We therefore agree with the construction of the word "business" given by the learned judge. It is to be noted that once the right principle has been decided the appellate court has said over and over again that the case becomes a matter of fact for him to make whether a business existed in respect of which the 1st appellant was interested at the time when he participated in the Ex. Co. meeting on October 2, 1974. There is ample evidence in the case to sustain the finding of the learned judge if he believed the evidence of PW23 and PW24 who gave them, as apparently he did, having seen and heard them. Respect for such finding, particularly where the issues depend so much on credibility and an estimate of rival personalities, appears to us to be a central pillar of the appellate process.

The 1st appellant's improprieties centred on the fact that he took part in a decision of Ex. Co. which was for the benefit of a prawn hatchery business known as Samasetia Sdn. Bhd. which was formed later. Because of his close connection with that business the learned judge found that he took part in the Ex. Co. decision over a matter in which he stood to gain financially. The learned judge having formed this view of the evidence, which he heard — a view which was open to him — it necessarily followed that he should find the charge against the 1st appellant proved. Our own subsequent reading of the transcript of the evidence has but confirmed us in this view.

What the court found culpable about the 1st appellant's conduct is that his motive in pressing the interests of Samasetia Sdn. Bhd. in the Ex. Co. was to further his own unavowed business interests, that is to say, he was raising a matter in Ex. Co. for his pecuniary advantage. That conduct is derogatory to the dignity of the Ex. Co. and inconsistent with the standards expected from its Members.

We are reluctant to believe the learned judge misread their evidence and came to the wrong conclusion that there was a "business" existing on the date the Ex. Co. decision was made. We therefore uphold the conviction of the 1st appellant.

The evidence against the 2nd appellant however unlike that against the 1st appellant is purely circumstantial. Also unlike the circumstantial evidence available against the 1st appellant, the evidence adduced against the 2nd appellant left much to be desired. In fact all that has been shown to prove the offence of abetment against the 2nd appellant were the evidence of PW23 and PW24 referred to earlier. An outstanding feature of the circumstantial evidence against him was that the important events proved are capable of being explained in isolation from the rest of the prosecution evidence. The event which occurred in Singapore sometime in January 1974 merely indicated that there was a business discussion between PW23, PW24 and the 2nd appellant and that it was the 2nd appellant who made the proposal for joint venture in the business between the Malaysians and Singaporeans. The second important evidence seemed to be relied on by the learned judge was the preparation of a draft letter typed and signed by Kipah binti Othman to apply for the land. This act of drafting the letter can be easily explained in a number of ways.

It is of the essence of the offence of abetment that the abettor should substantially assist the principal offender towards the commission of the principal offence. In fact it is an essential ingredient in a prosecution for abetment that there must be some evidence to show that the abettor actively suggested or stimulated the principal offender to the act by any means or language, direct or indirect, in the form of "expressed solicitation" or of "hints, insinuations or encouragement". There must also be common purpose or intent to aid or encourage the person who commits the principal crime and either an actual aiding or encouraging or a readiness to aid or encouraging will be required. The word "instigates" in section 107 of the Penal Code does not merely mean placing of temptation to do a forbidden thing but actively stimulating a person to do it — see *Soonavala* on Bribery and Corruption page 312. What was the evidence against the 2nd appellant? The answer is the evidence of PW23 and PW24 as referred to earlier. Looking at the evidence as a whole it would seem to us that the 1st appellant was the sort of person to be quite capable of looking after himself in his own interest and we do not think for a moment that the 1st appellant is the kind of person who needed any "hints" or "encouragement" to further his own interest by participating in the deliberation of the Ex. Co. meeting and advancing the grounds of bumiputra economic progress in support of the application of his bride-to-be. The 2nd appellant in our view may be an enterprising businessman with a lot of business ideas but we cannot punish a man because of his ideas. When all these matters are considered together, we are far from saying that there was sufficient material on which the learned judge could properly infer, as he did infer, that the 2nd appellant abetted the commission of the principal offence. In the circumstances we do not think the conviction against the 2nd appellant should be supported.

We therefore dismiss the appeal by the 1st appellant and allow the appeal by the 2nd appellant. The conviction and sentence of the 1st appellant are hereby confirmed. The conviction and sentence of the 2nd appellant are hereby set aside.

Order accordingly.

Solicitors: *Joseph & Son.*